IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10252 of 2003
with
SPECIAL CIVIL APPLICATION No 15574 of 2003
with
SPECIAL CIVIL APPLICATION No 10599 of 1999
with
SPCIAL CIVIL APPLICATION No 11860 of 2000
with
SPECIAL CIVIL APPLICATION No 8247 of 2001
with
SPECIAL CIVIL APPLICATION No 12495 of 2001
with
SPECIAL CIVIL APPLICATION No 201 of 2000
with
SPECIAL CIVIL APPLICATION No 7798 of 2000
with
SPECIAL CIVIL APPLICATION No 8186 of 1999
with
SPECIAL CIVIL APPLICATION No 8182 of 1999
with
SPECIAL CIVIL APPLICATION No 1192 of 2001
with
SPECIAL CIVIL APPLICATION No 3434 of 2001
with
SPECIAL CIVIL APPLICATION No 11589 of 2003
with
SPECIAL CIVIL APPLICATION No 13931 of 2003
with
CIVIL APPLIACTION No 12036 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI Sd/-
and
HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy : NO

of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

GUJARAT STATE MARKETING CO OP FEDERATION LTD.

Versus

STATE OF GUJARAT

Appearance:

SCA Nos. 10252 & 15574 of 2003
MR SK JHAVERI Senior Advocate with MS JIRGA D JHAVERI Advocate for Petitioners

SCA Nos.10599/99 & 11860/00 and CA 12036 of 2000
MR KG VAKHARIA Senior Advocate with MR. MK VAKHARIA and MR. TUSHAR MEHTA Advocates for Petitioners.

SCA Nos.8247/01 & 12495/01
MR PS CHAMPANERI Advocate for Petitioners

SCA Nos.201/00, 7798/00, 8186/99, 8182/99, 1192/01
MR BS PATEL Advocate for Petitioners

SCA NO.3434 of 2001
MR PUSHPADATTA VYAS for Petitioners

SCA No.11589 of 2003
MR KD SHAH for Petitioners

SCA No.13931 of 2003
MR HARIN P RAVAL for Petitioners.

Versus

MR SN SHELAT Advocate General with MS SHRUTI TRIVEDI GOVERNMENT PLEADER for the State (in all matters).

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 15/06/2004

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.H.WAGHELA for the Court:)

1. These petitions are grouped and heard together as they involve the common issue of the validity of sub-section (2) of Section 80 of the Gujarat Co-operative Societies Act, 1961 ('the Act' for short). However, the

petitions are required to be divided into three sub-groups viz. the petitions in which show cause notices to appoint nominee directors were issued, where appointment orders of such nominees were already issued, and the petitions filed only on the basis of apprehension of such appointments by the Government.

2. The relevant Section 80 of the Act reads as under:

"S.80 Power to appoint Government Nominee:

(1) Where the State Government has subscribed to the share capital of a society, directly or through another society, or has guaranteed the repayment of the principal of and payment of interest on, debentures issued or loans raised by a society, the State Government shall, notwithstanding anything contained in the bye-laws of such society, have the right to nominate three represenetatives on the Committee of such society, in such manner as may be determined by the State Government from time to time. The members so nominated shall hold office during the pleasure of the State Government, or for such period as may be specified in the order by which they are appointed, and any such member on assuming office shall have all rights, duties, responsibilities and liabilities as if he were a member of the committee duly elected.

Explanation: Any nomination of the Registrar or his nominee on the Committee of a society under the bye-laws of such society shall not be construed as nomination of the representative on that Committee in exercise of the right of the State Government under this sub-section.

(2) Where the State Government is of the opinion that having regard to the public interest involved in the operation of society it is necessary or expedient so to do, it may nominate its reprepsentatives on the committee of such society as if the State Government had subscribed to the share capital of the

society and the provisions of sub-section (1) shall, so far as may be apply to such nomination."

"Committee" is defined in Section 2 (5) as:
"the committee of management, or other directing body, to which the management of the affairs of a society is entrusted".

As per Section 74 of the Act, the management of every society shall vest in a committee constituted in accordance with the Act, the rules and bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed on it respectively by the Act, the rules and the bye-laws.

3. It must be noted at the outset that constitutional validity of the provisions of sub-section (2) of Section 80 has been tested and upheld by an elaborate judgment of a Division Bench of this Court as far back as in 1984 in AMRELI DISTRICT CO-OPERATIVE SALE & PURCHASE UNION LTD. AND OTHERS v. STATE OF GUJARAT [1984 (2) G.L.R. 1244] wherein it is held as under:

"78. Sec.80, as it originally stood in the principal Act, empowered the Government to nominate its representatives not exceeding three on the Committee of a society to the share capital of which the State Government has directly or indirectly subscribed or has guaranteed the repayment of the principal and interest on debentures issued or loans raised by such society. Two fold amendment has been made in Sec.80; firstly, by empowering the State Government to nominate its representatives notwithstanding anything contained in the bye-laws of such societies and, secondly, by inserting new sub-sec. (2) empowering the State Government to nominate the representatives on the committee of a society having regard to the public interest involved in the operation of such society it has been found necessary or expedient to do so as if the State Government had subscribed to the share capital of the society. We must reject the challenge to this new provision inserted by sub-sec. (2). The power is an enabling power which can be exercised only if the Government is satisfied that it is necessary or expedient to do so in the public

interest. The number of nominees cannot exceed three since it has been specifically provided that the provision of sub-section (1) shall, so far as may be, apply to such nomination. The tenure of such nominated persons shall be as may be specified in the order by which they are appointed and, therefore, if this power is sought to be abused by the State Government, it can be always subject to challenge in the Court of Law. It does not curtail the right of association nor the right to carry on business or trade guaranteed under Art.19 (1) (c) and (g) respectively. This provision, therefore, must be sustained."

"79. Before we part with the discussion pertaining to sec.80 (2), we must clarify since the petitioners apprehend abuse of this power that the State Government cannot exercise the power conferred by this section by appointing such persons who are disqualified to be members or who have incurred the disqualification as prescribed in the bye-laws. It is expected that the Government has to exercise such a wide power in a manner which does not infringe or violate the bye-laws prescribing the qualifications and/or disqualifications for being members of the society in question since otherwise this power would be arbitrary as it can be exercised for appointing those persons who might have been defeated at the elections or who would not have been entitled to be members or to continue as members of a given society in the ordinary course under the bye-laws such as persons who have committed defaults in the refund of the advances by the Society or who may be occupying offices in the society, or partners in the firm or appropriators (sic) of business having conflicting interests with that of the society. It is, therefore, expected of the State Government that it will prescribe a proper guideline in the matter of exercise of this power and see to it that the power is not exercised contrary to such guideline."

4. The above view has been consistently followed by this Court in several subsequent cases. The validity of the above provision and the exercise of power by the Government thereunder have been once again called into question in these petitions on several grounds and the submissions made in that regard are as under:

4.1 The learned counsel Mr.S.K.Jhaveri vehemently argued that the aforesaid decision of this Court upholding the validity of the provisions of sub-section (2) of Section 80 of the Act was per incuriam insofar as the ratio of the decisions in SMT. DAMAYANTI NARANGA v. UNION OF INDIA [1971 SC 966] was not considered in the context of the said provision, and, therefore, the validity of the said provision was required to be examined afresh in the light of the later judgment of the Supreme Court in ASOM RASTRABHASA PRACHAR SAMITI, HEDAYATPUR v. STATE OF ASSAM [AIR 1989 SC 2126). It was submitted that the impugned sub-section provided for appointment of directors on the formation of opinion about public interest involved in the operation of the society and the concept of public interest was left undefined. Therefore, an unbridled and unguided power on the basis of a vague concept of "public interest" was vested in the State Government the exercise of which, in effect, resulted in an arbitrary exercise of power calculated to disturb the power-balance within the managing committee of the society. It was submitted that, although this argument was dealt with in paragraph 45 of the aforesaid judgment, it was in the context of Section 17-A and not Section 80 (2) of the Act.

4.2 The learned senior counsel Mr.K.G.Vakharia submitted that the impugned provisions of Section 80 (2) imposed an unreasonable restriction on the fundamental right of the members of the society to form an association and carry on the business along the co-operative principles insofar as nominated members were thrust upon the managing committee so as to tilt the majority and destroy the autonomous character of the society. He also submitted that the provision does not prescribe any guidelines for qualifications of the nominated member, nor does it prescribe any criterion for the exercise of power to nominate, with the result that a person ineligible to be even an ordinary member of the society can be thrust upon its managing committee. He argued that by reading the provisions of sub-section (1) in sub-section (2) by incorporation, nomination of three representatives by the State in the name of public interest was but incongruous and unjustified, because public interest could as well be served by nomination of only one member. It was, on that basis, submitted that the provision was capable of being and in fact grossly abused on narrow political or partisan considerations. It was, therefore, an encroachment on the right of the members to run the association in a democratic way in accordance with the basic principles of co-operative

movement. He further submitted that there cannot be any public interest involved in running of the business of the co-operative society. It was contended that even assuming the provision to be valid after reading it down, the principles of natural justice were required to be scrupulously observed in both letter and spirit at the time of exercising the power and, for an effective and proper hearing, objective facts as to how public interest was involved in operation of the society and why it was necessary or expedient to nominate representatives ought to be disclosed to the society in the show cause notice and the committee on which members were to be nominated was required to be heard. It was also submitted that appointment of nominated members cannot be for an indefinite period and their term has to expire along with the term of the committee.

4.3 The learned counsel Mr.Tushar Mehta, referring to the judgment of this Court in THE MEHSANA DISTRICT CENTRAL CO-OPERATIVE BANK LTD. v. MAREDA SEVA SAHAKARI MANDALI LTD. [1990 (1) G.L.R. 423], submitted that basic co-operative principles were offended by the impugned provisions. International Co-operative Alliance has recognized as basic co-operative principles, voluntary and open membership and democratic control. It was also submitted that adequate provisions for State control were made in Sections 73, 74, 81, 82, 86 and 160 and, in view of that, the impugned provisions cannot be allowed to operate in violation of the aforesaid basic co-operative principles.

4.4 The learned counsel Mr.B.S.Patel submitted that restriction on the fundamental rights of the society in the name of public interest was not permissible and no public interest can be served by thrusting a member on the managing committee. He submitted that the representatives nominated in the name of public interest would also have the same rights, duties, responsibilities and liabilities which are prescribed by the Act, the Rules and the bye-laws made thereunder. Therefore, subserving any public interest could hardly be compatible with the business interest and commercial activity of the society. Relying upon the judgment of the Supreme Court in T.M.A. PAI FOUNDATION AND OTHERS v. STATE OF KARNATAKA [AIR 2003 SC 355], he submitted that, in any event, a private institution will have a right to constitute its own governing body, for which qualifications may be prescribed by the State. It will, however, be objectionable if the State restrains the Board to include specific individuals on the governing body. That judgment dealt with various facets of

establishment and administration of educational institutions in general and minority educational institutions in particular. He submitted that, when a co-operative society was not in an activity in which public at large was interested, no appointment in the name of public interest could be justified. He even made a curious submission that public interest can be served by making appointments in the staff of a society which actually deals with the public in the business or service activities of the society.

4.5 The learned counsel Mr.Pushpadatta Vyas submitted that the provisions of sub-sections (1) and (2) of Section 80 violate Article 14 inasmuch as they treat unequals as equals by equating the society in which the State Government has a financial stake and the society in which there is none. Relying upon the aforesaid judgment in T.M.A.PAI FOUNDATION (supra), he submitted that dictating of the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admission were held to be unacceptable restrictions by the 11 Judge Bench of the Apex Court.

4.6 The specific other issues raised in several petitions will be dealt with hereunder while deciding the particular petition.

5. The learned Advocate General Mr.S.N.Shelat, appearing for the respondent, submitted that the constitutional validity of the impugned provisions was already upheld by this Court in AMRELI DISTRICT CO-OPERATIVE SALE & PURCHASE UNION (supra) and there was no reason to take a different view particularly when that judgment was consistently followed thereafter. He also submitted that the Government had issued, revised from time to time and published the guidelines as envisaged in paragraph 79 of the said judgment so as to ensure that nominations were in conformity with the bye-laws of the society and the public interest and purpose of the provisions were duly served. Relying upon the judgment of the Supreme Court in SMT. SOMAWANTI AND OTHERS v. THE STATE OF PUNJAB AND OTHERS [AIR 1963 SC 151] and STATE OF BIHAR v. KALIKA KUER [AIR 2003 SC 2443], he submitted that an earlier decision was not rendered per incuriam or liable to be ignored because a possible aspect of the matter was not considered or not raised before the Court. It was also submitted that the judgment of the Supreme Court which is contended to have not been considered in the context of the impugned provisions was indeed considered in the said judgment

upholding the validity of the provisions; albeit in the earlier part of the judgment. He also submitted that, although the exercise of power in a given case may be a subject-matter of challenge, the validity of the provision itself could not be assailed on the assumption that the power could be abused. It was pointed out that, except in two petitions, either there was only show cause notice issued with a view to afford an opportunity of hearing or mere apprehensions of appointment of nominated representatives were expressed.

Relying upon the celebrated judgment of the Supreme Court in SMT. MANEKA GANDHI v. UNION OF INDIA [AIR 1978 SC 597] it was submitted that the words "in the interest of the general public" were held by the Apex Court to have a clearly well-defined meaning and the ground of public interest being an amorphous, nebulous or vague and indefinite concept was not available for assailing the provision. It was also pointed out from that judgment that the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right was not acceptable. Accordingly, whereas the fundamental right to form an association was not violated by appointment of nominated members on its managing committee, the fundamental right to carry on any occupation, trade or business was expressly subject to reasonable restrictions in the interest of general public.

Relying upon the judgment of the Supreme Court in PREMIUM GRANITES AND ANOTHER v. STATE OF TAMIL NADU [AIR 1994 SC 2233] and ORISSA TEXTILE AND STEEL LTD. v. STATE OF ORISSA [AIR 2002 SC 708], it was submitted that "public interest" was a definite concept and exercise of power "in public interest" must satisfy the test of reasonableness before a Court of law if it were challenged on the ground of improper exercise of power. However, it should also be borne in mind that it is not always feasible and practicable to lay down exhaustive guidelines which can cover all the contingencies. Moreover, the guidelines need not be expressly found in the impugned provisions but such guidelines can be gathered from the setting of the Act and the rules framed thereunder.

Relying upon the recent judgment of the Supreme Court in DHARAM DUTT AND OTHERS v. UNION OF INDIA [(2004) 1 SCC 712], it was submitted that a legislation cannot be struck down if it was within the legislative

competence of the elected legislature. The associations or unions of citizens cannot further claim as a fundamental right that they must also be able to achieve the purpose for which they have come into existence so that any interference with such achievement by law shall be unconstitutional. A right to form an association guaranteed under Article 19 (1) (c) does not imply the fulfilment of every object of an association as it would be contradictory to the scheme underlying the text and the frame of several fundamental rights guaranteed by Part III and particularly by the scheme of the guarantees conferred by sub-clauses (a) to (g) of clause (1) of Article 19. It is held in para (45) that "even in SMT. DAMAYANTI NARANGA v. UNION OF INDIA [1971 (1) SCC 678] the Constitution Bench has held that, after an association has been formed and the right under Article 19 (1) (c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire."

Referring to the judgment of the Supreme Court in DR.PRATAP SINGH AND ANOTHER v. DIRECTOR OF ENFORCEMENT [AIR 1985 SC 989], it was also submitted that the expression "so far as may be" was always construed to mean that the provisions may be generally followed to the extent possible. That expression, as deployed in sub-section (2) of Section 80 of the Act, had to be given its full meaning and the restrictive clauses appearing in sub-section (1) of Section 80 subjecting the nominated representative to the duties, responsibilities and liabilities as if he were an elected member of the committee have to be applied accordingly.

6. There was no dispute about the proposition that the society in which representatives were proposed to be nominated was required to be given adequate and meaningful opportunity of being heard and the proposition that how and on what basis the opinion that public interest was involved in the operation of a society was formed was required to be disclosed as a part of compliance with the principles of natural justice. Similarly, the necessity or expediency of nominating representatives had to be examined and established on objective facts. The State authorities appear to have consistently followed the practice of disclosing the names of the proposed nominees and detailed guidelines, the latest being by Resolution dated 8.4.2004, which were placed on record, are being followed to determine the eligibility of the proposed nominees as stated by the learned Advocate General. The guidelines issued by the Government from time to time are not under challenge.

7. This Court has, while upholding the validity of the amendments enacted by the Gujarat Co-operative Societies (Amendment) Act, 1981, in AMRELI DIST. CO-OP. SALE & PURCHASE UNION (supra), considered and dealt with in detail the judgment of the Supreme Court in SMT. DAMAYANTI NARANGA (supra). That judgment of the Supreme Court as also several subsequent judgments led the Court to hold that the amended provision in question was, though restricting the right of concerned co-operative societies to carry on business according to their bye-laws and the decision of the societies, justified in public interest. Although the discussion was in the context of insertion of Sections 17-A, 22 (2) and 24 of the Act, the same arguments and contentions of violation of Article 19 (1) (c) were urged and considered. In fact, a very useful and apposite discussion on the issue of 'public interest' and absence of guidelines as raised in the present petitions is also to be found in paragraph 45 of the judgment which may be quoted hereunder:

"45. .....It was urged on behalf of the petitioners that the entire guideline is vague and imprecise, inasmuch as there is absolutely no standard for determining as to what is in the interest of co-operative movement, or for that matter public interest or how the purpose of securing proper management can be best achieved. We are unable to persuade ourselves to agree with this criticism for the obvious reason that in the very nature of things it is not possible for the Legislature to lay down specific contingencies in the context of which this power can be exercised. In the very nature of the diverse situation that may arise as a result of the widespread tentacles of the co-operative movement where diverse situation of grave complexity and import may arise from time to time that if any attempt is made to lay down a strict formula the very purpose of the power would be defeated. The connotation of public interest as well as the interest of the co-operative movement may be overlapping, but it is not difficult to conceive a situation where the exercise of the power may be called for in the interest of the co-operative movement though it may not be strictly justified from the view point of public interest. The public interest is a larger circle while the interest of the co-operative movement is a smaller circle inside it. Though it is difficult to exhaustively enumerate what contingencies

> would constitute public interest and what would constitute the interest of co-operative movement, the two contingencies can be very well illustrated. The contingency of public interest arises when in the larger public interest some corrective measure is necessary in respect of the two societies, e.g. where the two trading societies act in a concert so as to earn profit in utter disregard of consumers and thereby undermining the public interest..... We should not be meant to lay down that in the illustrated situations the amalgamation of such societies is an imperative necessity. The later two contingencies can be said to be, in the ultimate analysis, a matter of public interest since any set-back in co-operative movement or any step for securing the proper management for any society is in the ultimate analysis necessary in the larger public interest. The amended provision though restricting the right of the concerned co-operative societies to carry on business according to their bye-laws and the decision of the societies, the restriction is justified in the public interest."

7.1 Thus, not only that the judgment in SMT. DAMAYANTI NARANGA (supra) is considered while negativing the same arguments but the above observation takes care of the other argument that "public interest" was a vague and amorphous concept and that there was an apparent conflict between "public interest" sought to be served by the impugned provision and the basic co-operative principles of autonomy, voluntary membership and management on democratic lines. We do not find any reason to take a different view on the same issues. The other judgment relied upon by Mr.Jhaveri, i.e. ALL INDIA BANK OFFICERS' CONFEDERATION v. UNION OF INDIA [AIR 1989 SC 2045] does not carry the case of the petitioners any further since it is considered in DHARAM DUTT (supra) and same contentions are negatived therein.

7.2 Similarly, the judgment of this Court in PATEL KODARBHAI JIVABHAI v. STATE [1983 (1) G.L.R. 325], wherein facts and circumstances led to the inference that administrative order passed in exercise of the power conferred under Section 80 (1) or (2) was to turn minority into majority, does not help the petitioners. The observations of the Madras High Court in V.G.ROW v. THE STATE OF MADRAS (AIR 1951 Mad. 147) and of the Supreme Court in appeal therefrom [AIR 1952 SC 196], in the context of the Criminal Law Amendment Act, also do

not help the petitioners in any manner. It was laid down therein that the formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights. It was also held therein that the right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be fully tested in a judicial inquiry, is a strong element which must be taken into account in judging the reasonableness of the restrictions imposed on the exercise of the fundamental right under Article 19 (1) (c) of the Constitution. The judgment of the Supreme Court in STATE OF U.P. AND ANOTHER v. C.O.D. CHHEOKI EMPLOYEES CO.OP. SOCIETY LTD. [AIR 1997 SC 1413] clearly holds in paragraph 15-B as under:

> "15B. So, the society having been formed is governed by the provisions of the Act. The individual member does not have any fundamental right to the management of the Committee except in accordance with the provisions of the Act, rules and bye-laws. The management of the Committee is regulated by Section 29 of the Act. The composition thereof is also regulated by the Act and has to be in accordance with the Rules and the bye-laws. The Rules referred to hereinbefore have to be in furtherance of and in conformity with the provisions contained in Section 130 (2) (xii) and (xii-A) and the Rules providing for reservation in the election of the Committee or for nomination to the Management Committee of the members belonging to the weaker sections and women should be to effectuate socio-economic and political justice assured by the Preamble, Articles 38 and 46 of the Constitution."

It is also held in the above judgment that:

> ".....The bye-laws prescribe the eligibility of the members who would be eligible to be nominated

as members of the society and the disqualifications have been provided under Rule 393 of the Rules. Under those circumstances, these provisions do indicate the guidelines under the Act. If any one is nominated in derogation of the guidelines provided under the Act and rules, that would be an individual case to be considered separately but on that count alone, the Act and the Rules cannot be declared to be ultra vires."

In DAMAN SINGH AND OTHERS v. STATE OF PUNJAB AND OTHERS [AIR 1985 SC 973] at page 979, the Constitution Bench of the Supreme Court had held, as observed in the above judgment, that the creation, constitution and management of the society is a creature of statute. They are controlled by statute and so, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom to form association.

8. As far as the reasonableness of restriction imposed by a statute on the fundamental rights guaranteed by Article 19 of the Constitution is concerned, the following broad principles and guidelines are required to be kept in mind as held by the Supreme Court in PAPNASAM LABOUR UNION v. MADURA COATS LTD. [AIR 1995 SC 2200]:

(a) The restriction sought to be imposed on the fundamental rights guaranteed by Article 19 of the Constitution must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved;

(b) There must be a direct and proximate nexus on a reasonable connection between the restriction imposed and the object sought to be achieved;

(c) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case;

(d) In interpreting constitutional provisions, Court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation;

(e) In appreciating such problems and felt need of the society, the judicial approach must necessarily be dynamic, pragmatic and elastic;

(f) It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on fundamental right;

(g) Although Article 19 guarantees all the seven freedoms to the citizen, such guarantee does not confer any absolute or unconditional right but is subject to reasonable restriction which the legislature may impose in public interest. It is, therefore, necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values;

(h) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by processual perniciousness or jurisprudence of remedies;

(i) Restriction imposed on the fundamental right guaranteed under Article 19 of the Constitution must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminatory. Exhypothesi, therefore, a restriction to be reasonable must also be consistent with Article 14 of the Constitution;

(j) In judging the reasonableness of the restriction imposed by Clause (6) of Article 19, the Court has to bear in mind directive principles of State Policy; and

(k) Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest.

8.1 As far as challenge to the exercise of power to nominate is concerned, as held by the Supreme Court in OM KUMAR AND OTHERS v. UNION OF INDIA [AIR 2000 SC 3689], when a statute gave discretion to an Administrator to take a decision, the scope of judicial review would remain limited. Interference was not permissible unless one or other of the following conditions were satisfied, namely, the order was contrary to law, or relevant

factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. Under the principle of proportionality, the Court will see that the Legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The Legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court to decide.

It is also observed in the same judgment that, while the Court's level of scrutiny will be closer in case of restrictions on fundamental freedoms, the Courts give a large amount of discretion to the Administrator in matters of high level economic and social policy and may be reluctant to interfere. Under Article 19 (2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the Administrator for imposing restrictions or whether the Administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. Recognizing the principle of proportionality, the Supreme Court of Israel has stated that it consists of three elements: First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such means that do not injure the individual more than necessary. And third, the injury caused to the individual by the exercise of the power should not be disproportional to the benefit which accrues to the general public.

8.2 Examining an administrative action on the anvil of Article 14, it has to be seen whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. Another test laid down by Justice Bhagwati in E.P.ROYAPPA v. STATE OF TAMIL NADU [AIR 1974 SC 555] was that if the administrative action was arbitrary, it could be struck down under Article 14. Arbitrary action by the

Administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable. The test applied by the European Court in LITHGOW v. UK [(1996) ECHR 329] was as under:

"The differential treatment must not only pursue a legitimate aim. It had to be proportionate. There had to be relationship of proportionality between the means employed and the aim sought to be realized."

It is concluded in paragraph 68 of the judgment in OM KUMAR (supra) that: ".....when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principles applies."

9. Reviewing the historical background and scheme of the Act in the context of the controversies raised and the legal propositions extracted hereinabove, it was seen that the Act was enacted to satisfy the felt need to encourage and supervise the co-operative movement for imparting the advantages of organized thrift, self-help and mutual aid. The Bombay Co-operative Societies Act, 1925, in its preamble, recited that it was enacted with a view to facilitate the formation and working of co-operative societies for promotion of thrift, self-help and mutual aid not only amongst agriculturists but also other persons with common economic need so as to bring about better living, better business, and better methods of production. After bifurcation of the erstwhile State of Bombay, the need was felt by the Government of the new State of Gujarat to consolidate and amend the law relating to co-operative societies in the State of Gujarat and a purposeful attempt was made to systematically develop co-operative societies at different levels and the co-operative movement in general in accordance with the Directive Principles of State Policy.

9.1 Section 4 of the Act providing for registration of the society is as under:

"Sec.4 Societies which may be registered:
A society, which has as its object the promotion of the economic interests or general welfare of its members, or of the public, in accordance with

co-operative principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act:

Provided that it shall not be registered if, in the opinion of the Registrar, it is economically unsound, or its registration may have an adverse effect upon any other society, or it is opposed to, or its working is likely to be in contravention of public policy."

It is clear from the plain reading of the above provision that promotion of economic interests or general welfare of the public are the ultimate objects for which a society can be formed and registered and its registration can be denied if it is likely to have an adverse effect or if its registration were opposed to, or working of the society is likely to be in contravention of public policy. The whole Chapter V of the Act is devoted to "State Aid to Societies". Under the provisions of Section 63, the State Government may give loans to a society or guarantee various payment or repayment to be made by the society as also may provide financial assistance in any other form, including subsidies to a society. Thus, besides a direct financial stake of the Government in the society, public interest in and financial assistance to a society is expressly envisaged in the scheme of the Act. The provisions of Sections 22 and 24 of the Act provide for open membership and, subject to the provisions made therein, a duly qualified person cannot be denied membership in a society. In Chapter VII, detailed provisions for management of societies are made and several safeguards are provided ensuring effective supervision by the State through Registrar so as to ensure proper management and financial health of the society.

In STATE OF U.P. (supra) while dealing with validity of the provisions for nomination of representatives on the committee of a co-operative society on the basis of reservation, the Supreme Court observed that in our onward march of economic independence, India was destined to be a co-operative commonwealth. Since activities are diversified, more especially in the rural areas, every activity of a person devoted to agriculture in the rural area is considerably influenced by the co-operative movement, such as seed distribution, credit, disposal of agricultural produce etc.

Therefore, it cannot be accepted that a co-operative society is but an association of persons perusing business, trade or service activities on purely commercial lines. On the contrary, public interest is involved right from the stage of inception and registration of a society. The phrase "public interest involved in the operation of a society" only expands the scope of public interest since the operation of a society may affect so many persons other then its members and may have several social, economic and legal repercussions. The objects for which the society is formed may have a direct bearing on the interests of the public within the area of its operation. The commodities and/or services in which the society deals and the method and manner of its operation can have a direct impact on the interests of the community with which it deals or the people affected by its acts and omissions. There is no substance in the argument that by virtue of several other provisions contained in Sections 73, 74, 81, 82, 86 or Section 160, public interest could be adequately taken care of, because, none of those provisions have as its concern the public interest involved in the operation of a society. Although it is not specified in the Section itself as to in what events it would become necessary or expedient to nominate representatives on the committee of a society, the opening words of the provision, namely, "Where the State Government is of the opinion that having regard to the public interests involved in the operation of a society" lay down adequate guidelines and provide for a condition precedent to the exercise of power. The provision clearly contemplates application of mind by the State Government for the formation of opinion as to the involvement of public interest in the operation of a society as also as to the necessity or expediency of nominating representatives on its committee. The considerations would encompass the field or area in which the society operates, the manner of its operation, the goods or commodities in which it deals and all other factors that have any effect on the interests of the concerned public in the area of its operation. The extent to which the interest of public is affected or is required to be safeguarded will be a matter for the welfare State to consider while forming the opinion as to whether it is necessary or expedient to make such nomination. The guidelines of "public interest" and the requirement of examining the necessity or expediency for exercise of power to nominate are, in our view, sufficient in-built safeguards in the impugned provisions against any arbitrary exercise of power.

9.2 The impugned provision of sub-section (2) of

Section 80 obviously operates in the context of the functioning of the society after it is formed. The power under the provision can be exercised only when a society exists and then only the question of appointing nominees on the committee of such society arises. Therefore, there is no restriction imposed by the provision on the formation of the society. The judgment of the Supreme Court in DHARAM DUTT (supra) lends support to this conclusion. Therefore, the challenge against the impugned provisions based on the alleged violation of Article 19 (1) (c) is misconceived and fails.

9.3 Once the society is formed, the management or functioning of the society will be a matter relating to the business of the society and reasonable restrictions in the interest of the general public can be imposed by law under Clause (6) of Article 19 and, in the context of such right under Article 19 (1) (g). Even assuming for the sake of argument that such right can be claimed by the society, the provisions of Section 80 (2) empowering the State to nominate members are in consonance with the permissible limits of reasonable restrictions. As discussed hereinabove, the impugned provisions have in-built guidelines and sufficient safeguards against any arbitrary exercise of power and hence the argument that they conferred arbitrary and unguided powers is also negatived. However, in the matter of exercise of such power, procedural safeguards have to be applied and to ensure that the observation of principles of natural justice is implied as held by this Court in SHREE BILESWAR KHAND UDYOG & ANR. v. STATE OF GUJARAT [1993 (1) GCD 328] in the context of the same provision.

9.4 The nominations made under Section 80 of the Act are on the "Committee" which is defined in Section 2 (5) as the committee of management or other directing body, to which the management of the affairs of the society is entrusted. Under the provisions of Section 74 of the Act, the management of every society is vested in a committee constituted in accordance with the provisions of the Act and the Rules and bye-laws made thereunder. Since nomination of members is contemplated to be made on such committee, the duration of such nomination or the term of such representatives on the committee, unless expiring or determined earlier, will be co-extensive with the life of the committee itself. Such nomination on the committee cannot last beyond the life of the committee. Since the managing committee is required to be constituted in accordance with the provisions of the Act and the Rules and bye-laws, the provisions thereof would be determinative of the life of the committee.

10. As the upshot of the above discussion, the conclusions as under can be summarised:-

(a) the provisions of sub-section (2) of Section 80 of the Act are constitutionally valid and there is no reason to take a view different from the view taken by this Court in AMRELI DISTRICT CO.OP. SALE & PURCHASE UNION LTD. [1984 (2) GLR 1244];

(b) the exercise of power conferred upon the State Government under the provisions of Section 80 (2) in a given case is open to challenge and is subject to judicial review;

(c) any order nominating representatives in exercise of the powers under Section 80 (2) of the Act will be liable to be struck down if the order was contrary to law or if relevant factors were not considered or irrelevant factors were considered in making the order or the decision was such that no reasonable person would have taken it;

(d) the nomination of representatives on the committee of a society in exercise of the powers under Section 80 (2) is coextensive with and operates only during the term of the committee on which such nominees are appointed;

(e) the term of office of the representatives nominated under Section 80 (2) shall depend upon, besides the pleasure of the State Government or the terms specified in their appointment orders, the Rules and bye-laws of the society regarding constitution and term of the committee;

(f) the appointment of representatives on the committee of a society by nomination under the provisions of Section 80 (2) has civil consequences, and, therefore, the principles of natural justice are required to be observed while forming the opinion that, having regard to the public interest involved in the operation of the society, it is necessary or expedient to nominate the representatives. For compliance with the principles of natural justice, adequate and meaningful opportunity of hearing has to be given to the society and, as a part thereof, the society has to be informed about the grounds on which the opinion as to involvement of public

interest in the operation of the society was based and the necessity or expediency for the nomination had arisen. The guidelines evolved and issued in compliance with the observation in paragraph 79 of the judgment in AMRELI DISTRICT CO.OP. SALE & PURCHASE UNION LTD. (supra) are also required to be followed while exercising the power and the exercise of power has to be consistent with such guidelines; and

(g) the power to nominate under Section 80 (2), by incorporation of the provisions of sub-section (1), means the right to nominate three representatives as if the State Government had subscribed to the share capital of the society;

11. Examining the present set of petitions in light of the above conclusions, the three groups of petitions have to be disposed by the orders as under:

(a) Special Civil Applications Nos.10252 of 2003, 13931 of 2003, 11589 of 2003, 7798 of 2000 and 15574 of 2003 have been filed only on the basis of an apprehension that appointments of nominated representatives were likely to be made in exercise of the powers under Section 80 (2) of the Act. The additional prayer made in Special Civil Application No.10252 of 2003 for a direction restraining the respondent from appointing nominees under Section 80 of the Act has no factual basis since such appointments on the basis of financial stake and the resolutions of the society to accept such appointments appear to have been made in the year 1978 and 1999 of which the orders are not under challenge. And, no prayers with regard to those nominees or continuance thereof are found in the petition. These petitions are, therefore, rejected as premature and devoid of any cause of action. Rule in each of these petitions is accordingly discharged;

(b) Special Civil Applications Nos.8247 of 2001, 12495 of 2001, 10599 of 1999 and 3434 of 2001 are filed at the stage where show cause notices are issued in contemplation of nominations under Section 80 (2) of the Act. The notices in each of these cases are found to be not in consonance with the principles laid down hereinabove and hence, the impugned notices/letters/communiations

are quashed with liberty to the appropriate authorities to initiate proceedings afresh in accordance with law. These petitions are, therefore, allowed to that extent and Rule is made absolute accordingly in each of them;

(c) In Special Civil Applications Nos.8182 of 1999 and 8186 of 1999, the show cause notices for granting opportunity of being heard to the society concerned are issued and the notices appear to be valid and in accordance with law. These petitions are, therefore, rejected, Rule is discharged and the interim relief granted earlier is vacated in each of these petitions, with the result that the proceedings initiated by the respondent for nomination of representatives may be resumed in accordance with law;

(d) In Special Civil Applications Nos.11860 of 2000 and 201 of 2000, the show cause notices and the impugned orders made in the exercise of the powers under Section 80 (2) are found to be inconsistent with the legal propositions summarised hereinabove.

In Special Civil Application No.11860 of 2000, no reply to the amended petition is filed and hence the allegations made against the legality of the impugned order appointing three representatives remain uncontroverted. The impugned order is found and held to be clearly in violation of the principles of natural justice and hence quashed. Rule is accordingly made absolute and Civil Application No.12036 of 2000 filed therein for interim relief is disposed of as not surviving and rejected.

In Special Civil Application No.201 of 2000 also, the allegations made to challenge the impugned order appointing three representatives are not denied by the respondent by filing any reply and the impugned order does not disclose the necessity or expediency of appointment of nominees of the State. The petition is, therefore, allowed and the impugned order dated 30.11.1999 at Annexure-A is quashed. Rule is made absolute accordingly;

(e) In Special Civil Application No.1192 of 2001, the impugned order dated 25.5.2000 clearly appears to have been made after sufficient opportunity of

hearing being granted to the petitioner and after recording reasons and grounds which are not seriously challenged. The petition is mainly based on the challenge to the constitutional validity of Section 80 (2) and is filed after about eight months of the making of the impugned order. The allegations of mala fides and ulterior motives, though not controverted by any reply, are vague and have remained unsubstantiated by any material or factual averments. Therefore, the impugned provision being held to be valid, the petition has to be rejected. Accordingly, the same is rejected, Rule is discharged and interim relief is vacated;

(f) In the facts and circumstances, there is no order as to costs in any of the petitions disposed by this judgment.

Sd/-

(R.K.Abichandani, J.)

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)

At this stage, the learned counsel for the petitioners requested to continue the interim relief which was operating during the pendency of the petitions. We find no justification for acceding to that request.

Sd/-

(R.K.Abichandani, J.)

Sd/-

(D.H.Waghela,J.)